United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7091

To be argued by
VINCENT L. LEIBELL, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

FORD MOTOR COMPANY,
Plaintiff-Appellant,

against

M.V. "AUSTRAL ENTENTE", her engines, boilers, etc.,

and against

FARRELL LINES, INC.; UNIVERSAL TERMINAL and STEVEDORING CORPORATION and FRANK J. HOLLERAN, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT

The Issues Presented For Review

1. Whether by virtue of a certain clause in a bill of lading, a defendant stevedore is entitled to the benefit of the $500.00 per package limitation accorded an ocean carrier by The *Carriage Of Goods By Sea Act* (COGSA), 46 U.S.C. 1304(5). (For convenience a copy of Clause 4—the clause in question—is attached hereto, at page 12, as Schedule "A". The full long-form bill of lading—of which Clause 4 is a part—is reproduced as Exhibit "B" at p. 10a.*)

* References are to pages in the Joint Appendix.

2. Whether by virtue of a certain clause in a bill of lading, defendant lasher is entitled to the benefit of the $500.00 per package limitation accorded an ocean carrier by The *Carriage of Goods By Sea Act* (COGSA), 46 U.S.C. 1304(5). (The same references in paragraph "1" above pertain to this issue.)

Statement Of The Case

This is an appeal by the plaintiff Ford Motor Company from so much of an interlocutory Order and Judgment in an admiralty action in the Southern District of New York (Wyatt, J.), which limits plaintiff's recovery against defendants Universal Terminal and Stevedoring Corporation and Frank J. Holleran, Inc. to five hundred dollors for the contents of each case of cargo (p. 5a). Following certification by Judge Wyatt, pursuant to Title 28 U.S.C. Sec. 1292(b), (p. 6a), this Court granted leave to appeal (p. 32a).

The Facts

On or about March 31, 1975, seven cases of machine parts belonging to the plaintiff were delivered to defendant Farrell Lines, Inc. (hereafter Farrell) at Port Newark for ocean carriage on the M.V. "Austral Entente" to Melbourne, Australia, there to be delivered by Farrell to the consignee (p. 16a). A clean, short form bill of lading was issued by Farrell (p. 16a; Exhibit "A", p. 8a). Incorporated therein by reference was Farrell's long form bill of lading (p. 19a; Exh. "B", p. 10a). Defendant Universal Terminal and Stevedoring Corporation (hereafter Universal) stowed all the cargo loaded on the vessel (p. 16a). Defendant Frank J. Holleran, Inc. (hereafter Holleran) lashed all the cargo loaded on the vessel (pp. 16a, 17a). Plaintiff's cargo, along with cargo owned by other shippers, was stowed in "Bay 19" of the vessel (pp. 7a; 14a; 17a).

One day after the vessel left Port Newark, while it was heading South about 70 miles off the east coast of the United States, a huge case of mining machinery (not owned by the plaintiff), weighing 76,500 pounds, "broke stow and commenced moving heavily from side to side thereby being in contact with the other cases in this hatch and damaging same" (p. 17a; Exhibits "1" and "2" at pp. 21a and 23a). Among the cases of cargo damaged were the seven belonging to the plaintiff (p. 17a). After the cases of cargo stowed in "Bay 19" broke their stow and lashings, the M.V. "Austral Entente" put into the port of Charleston, South Carolina, where it discharged the 76,500 pound piece of mining machinery, as well as plaintiff's seven cases of damaged cargo (p. 18; Exhibits "1" and "2" at pp. 21a and 23a).

The fact that the heavy mining machinery—not owned by the plaintiff—broke stow and created a domino effect, which subsequently damaged plaintiff's cargo, is of the utmost importance in this appeal.

POINT I.

A bill of lading provision which attempts to extend the five hundred dollar package limitation in the Carriage of Goods by Sea Act to a third party will be strictly construed against the party it is claimed to benefit. Courts will not stretch the language used by the ocean carrier, because it is an effort to alter long standing rules of law which visit liability upon a tortfeasor for the consequences of his negligence.

The Carriage Of Goods By Sea Act (hereafter COGSA), 46 U.S.C. 1300 *et seq.*, imposes certain restrictions upon ocean carriers and gives them certain benefits. The law deals solely with the rights and liabilities of shippers and carriers. Nowhere in COGSA are stevedores, lashers, or

agents of the carrier mentioned. The United States Supreme Court in *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297, 301-302, said:

> "There is, thus, nothing in the language, the legislative history or environment of the Act (COGSA) that expressly or impliedly indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence. It must be assumed that Congress knew that generally agents are liable for all damages caused by their negligence."

This Court has labelled a bill of lading as a contract of adhesion. *Encyclopaedia Britannica, Inc.* v. *S.S. "Hong Kong Producer"*, 422 F(2d) 7, 15, cert. den. 397 U.S. 964; *Cabot Corp.* v. *S.S. "Mormacscan"*, 441 F(2d) 476, 478, cert. den. 404 U.S. 855. It has also held that a clause in a bill of lading attempting to extend the benefits of limited liability to others "must be looked at with distrust". *Bernard Screen Printing Corporation* v. *Meyer Line*, 464 F(2d) 934, 936.

While it is unquestionably true that an ocean carrier in a bill of lading may extend the $500.00 per package limitation of liability to third parties, it is equally true that "a bill of lading containing such a limitation will be strictly construed against the parties whom it is clamed to benefit. (Cases cited.)" *Toyomenka, Inc.* v. *S.S. "Tosaharu Maru"* (2 Cir.), 523 F(2d) 518, 521. The Supreme Court in the *Herd* case, 359 U.S. 297, 305, used the same language.

Accordingly, our courts, when construing provisions of bills of lading which attempt to limit the liability of third parties for their negligence, "will not stretch the language" used in such provisions. *Cabot Corp.* v. *S.S. "Mormacscan"* (2 Cir.), 441 F(2d) 476, 479. Indeed, "technical precision of language has been the benchmark of our decisions and of those of the Supreme Court". *Toyomenka, Inc.* v. *S.S. "Tosaharu Maru"* (2 Cir.), 523 F(2d) 518, 520.

POINT II.

Defendants Universal and Holleran claim that they have a legal right to limit their liability to the plaintiff to five hundred dollars per package by virtue of the terms of the so-called "Himalaya" clause (No. 4) in the bill of lading issued to Ford. However, that clause, by its own language, specifically refers only to the "performance of work and services" which said defendants are expected to undertake in connection with "this contract" (the bill of lading issued to Ford). The "Himalaya" clause does not refer, in any respect, to work done by either defendant in connection with another shipper's goods pursuant to another contract.

Judge Anderson of this Court in *Encyclopaedia Britannica, Inc.* v. *S.S. "Hong Kong Producer"*, 422 F(2d) 7, 12, noted the "persistent efforts" of ocean carriers, who draft bills of lading, to insert "into the foot long, double columns of well neigh indecipherable fine print, various exceptions to their possible liabilities". The bill of lading issued to Ford follows this pattern (Exh. "B", p. 10a).

Clause 4 of the bill of lading issued to Ford (Schedule "A" at page 12 of this brief) is divided into three sections labelled (a), (b) and (c). Section (a) has 110 words strung together in one sentence. Section (b) consists of one sentence of 48 words, with a reference back to section (a). Section (c) is composed of one sentence of 57 words, with a reference back to sections (a) and (b).

The first 35 words, of the one sentence Clause 4(a) of the bill of lading issued to Ford (Schedule "A", at p. 12 of this brief), set forth Farrell's reasons for wanting to endow third parties with the benefits of its own COGSA-granted $500.00 per package limitation:

> "4. BENEFICIARIES OF EXEMPTIONS, ETC.—(a) Because of the relationship between them and as the car-

> rier requires persons and companies to perform or assist it in *performance of work or services undertaken by it in this contract,* it is expressly agreed * * *'' (emphasis ours).

No other reason is given.

Following the language quoted above, Clause 4 goes on to state that those named therein who are to perform "such work or services * * * under *this bill of lading* (emphasis ours) shall be entitled to the ocean carrier's statutory exemptions and immunities.

Clause 4 of the bill of lading issued to Ford, in its total of 215 words in three sentences, refers to "this contract" once and to "this bill of lading" twice. Now, defendants Universal and Holleran—in order to limit liability for their negligence to $500.00 per package—argue that Clause 4 of the bill of lading issued to Ford is intended to protect them, when their negligent services, in connection with another shipper's goods under another bill of lading, result in damage to plaintiff's goods. Plaintiff disagrees with their argument.

The same issue, which is the subject of this appeal, was presented to Judge Edelstein in *Cabot Corp.* v. *S.S. "Mormacscan"*, 298 F.Supp. 1171. There, a stevedore dropped two heavy steel plates (owned by a stranger to the action) from a sling damaging a steam turbine generator set owned by the plaintiff. The applicable provisions of the Cabot bill of lading are quoted by Judge Edelstein at page 1172 of his opinion. There, too, the ocean carrier tried to endow *"all persons rendering services in connection with the performance of this contract"* with the COGSA $500.00 per package limitation.

After noting that defendant's negligence occurred at a time when it was not rendering services under Cabot's

bill of lading, Judge Edelstein, at page 1174, said:

> "Defendant would have the Court stretch the plain meaning of the words 'this contract' to include other cargo loading operations for different shippers under different bills of lading on the rather novel theory that completion of the loading operation for the entire ship would benefit each of the individual shippers. In essence, at the expense of an unsuspecting shipper, the defendant is attempting to extract from a narrow clause of a bill of lading a blanket immunity the penumbrae of which can only be a matter of speculation. But the phrase 'this contract' must be construed strictly and cannot be held to refer to anything but the bill of lading under which Cabot's cargo was to be shipped."

While the language of the *Cabot* and *Ford* "Himalaya" clauses is not identical, the substance is exactly the same, since both refer to "this bill of lading" and "this contract". The logic in Judge Edelstein's ruling is compelling.

When the *Cabot* case was appealed, this Court affirmed at 441 F(2d) 476, but upon a different ground. Judge Hays, at page 478, held that the language used was so "ambiguous" that one could not tell if a stevedore was intended to be included in the phrase "all persons rendering services".

Before Judge Wyatt, defense counsel argued that this Court had "repudiated" the holding of Judge Edelstein. There is, of course, no legal or factual substance to such an argument, and it is not likely that it will be made again to this Court. Actually, Judge Hays, at page 478, said:

> "One can only guess whether Clause 13" * * * means "initially whether 'all persons rendering services' is designed to include stevedores loading the goods of another shipper".

Later, in *Rupp* v. *International Terminal Operating Co., Inc.*, 479 F(2d) 674, 677, Judge Timbers quoted this same statement by Judge Hays. If this Court had disagreed with the logic of Judge Edelstein's opinion in the *Cabot* case (*supra*) it, no doubt, would have taken occasion to say so in either the *Cabot* or *Rupp* opinions.

Judge Newman in *Bernard Screen Printing Corp.* v. *Meyer Line,* 328 F.Supp. 288, aff'd (2 Cir.) 464 F(2d) 934 (decided three months after this Court's opinion in the *Cabot* case), noted, as we do, the significance of the above quoted statement from Judge Hays' opinion in the *Cabot* case (see page 7 of this brief), when he said, at page 290:

> "In refusing to extend the limitation of liability provision to the stevedore, the Court nevertheless noted that there was doubt as to 'whether (the language) "all persons rendering service" is designed to include stevedores loading the goods for another shipper'. And significantly, in *Cabot Corp.* the stevedore was loading steel plates belonging to another shipper when it caused damage to the plaintiff's property, and was not engaged in performance of the contract, i.e., the bill of lading in issue."

Plaintiff submits that it is not a mere coincidence that the *Ford, Cabot* and other bills of lading, contain provisions limiting an ocean carrier's attempt to endow third parties with the $500.00 per package limitation to "this bill of lading" or to "this contract". It is one thing to grant a negligent third party the benefit of a limitation of liability for work performed on goods, which are the subject of the basic contract between the carrier and the shipper. It is quite another thing to attempt to grant the same limitation of liability to a third party for negligent work performed upon the goods of someone else, who is not a party to the basic contract between the carrier and the shipper. As Judge Edelstein said: "* * * the defend-

ant is attempting to extract from a narrow clause of a bill of lading a blanket immunity the penumbrae of which can only be a matter of speculation". *Cabot Corp.* v. *S.S. "Mormacscan"*, 298 F.Supp. 1171, 1174.

An ocean carrier has legal control of a shipper's goods from the time it receives said goods until they are delivered at destination. Such is not the case with a stevedore or a lasher. Their control—such as it is—is for a limited purpose during a limited time.

It is the plaintiff's position, that an ocean carrier has no legal right to force a shipper, in a contract of adhesion (a bill of lading), to agree that a third party is entitled to limit its liability for damage caused to the shipper's goods as a result of negligent work performed upon the goods of another shipper, who is a stranger to plaintiff's bill of lading.

But even assuming, without conceding, that an ocean carrier has such legal power, it could—if that is its purpose—simply provide in each bill of lading that "all those performing work or services in connection with the loading or lashing of cargo for this voyage are entitled to limit their liability to five hundred dollars per package, regardless as to whether the damage results, directly or indirectly, from negligence in connection with the goods of this, or any other, shipper". Aside from the issue of illegality, such a provision in a bill of lading would, at least, be "clearly expressed".

POINT III.

There is an additional reason why the defendant Holleran (the lasher) should not have the benefit of the five hundred dollar package limitation. While stevedores and longshoremen are specifically named in Clause "4" of the bill of lading, lashers are not named. Courts will not stretch the language of such a clause to add those who might easily have been added had the party drafting a contract of adhesion so desired.

Lashers are just as necessary as stevedores to make a vessel, carrying break-bulk cargo, ready for a sea voyage. Stevedores are supposed to carefully load and position cargo. Lashers are supposed to properly secure the cargo for the voyage.

Clause "4" of the bill of lading issued to Ford (attached hereto at page 12 as Schedule "A") specifically mentions stevedores and longshoremen among those the ocean carrier would like to endow with its COGSA-given package limitation. Lashers are not mentioned, yet their services are just as necessary as those of stevedores to properly prepare a vessel, carrying break-bulk cargo, for a sea voyage. The doctrine of *inclusio unius est exclusio alterius* should preclude the lasher from asserting a claim that it is included among those enjoying limitations contained in an ocean carrier's bill of lading.

The United States Supreme Court in *The Monrosa* v. *Carbon Black, Inc.*, 359 U.S. 180, 182-183, said:

> "In accordance with the familiar rule in such circumstances, we will not stretch the language when the party drafting such a form contract has not included a provision it easily might have. The Caledonia, 157 U.S. 124, 137; The Majestic, 166 U.S. 375,

386; Compania de Navigacion La Flecha v. Brauer, 168 U.S. 104, 118".

This Court said the same thing in *Cabot Corp.* v. *S.S. "Mormacscan"*, 441 F(2d) 476, 479, cert. den. 404 U.S. 855, and in *Rupp* v. *International Terminal Operating Co., Inc.*, 479 F(2d) 674, 677.

The ocean carrier, having undertaken to specifically name stevedores and longshoremen, could have—had it so desired—named lashers. Not having done what it "easily might have", leaves the lasher outside the ambit of the "Himalaya" clause.

CONCLUSION

The Order and Judgment of Judge Wyatt (p. 5a) should be reversed, in so far as it limits to five hundred dollars per package the recovery of the plaintiff against defendants Universal and Holleran.

Respectfully submitted,

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SCHEDULE "A"

Clause 4 of the Ford bill of lading.

4. BENEFICIARIES OF EXEMPTIONS, ETC.—(a) Because of the relationship between them and as the carrier requires persons and companies to perform or assist it in performance of work or services undertaken by it in this contract, it is expressly agreed between the parties hereto that the master, officers, crew members, contractors, stevedores, longshoremen, agents, representatives, employees or others used, engaged or employed by the carrier in the performance of such work or services, shall each be the beneficiaries of and shall be entitled to the same, but no further, exemptions and immunities from and limitations of liability which the carrier has under this bill of lading, whether printed, written, stamped thereon or incorporated by reference.

(b) Without limitation or restriction of the exemptions and immunities from and limitations of liability provided for in subdivision (a), the persons and companies mentioned therein shall be entitled to the same, but no further, benefits which the carrier has under Clauses 25 and 26 of this bill of lading.

(c) Without limitation or restriction of the exemptions and immunities from and limitations of liability provided for in subdivisions (a) and (b), the persons and companies mentioned therein shall be entitled to the same, but no further, benefits which the carrier has under the U.S. Carriage of Goods by Sea Act, including but not limited to Sections 3(6), 4(1), 4(2)(a), 4(2)(b), 4(2)(q) and 4(5) of said Act.

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